Neutral Citation Number: [2021] EWCA Civ 1206

Case No: A3/2020/1387; A3/2020/1502

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
Adam Johnson QC (Sitting as a Deputy High Court Judge)
[2020] EWHC 1673 (CH)
Stephen Houseman QC (Sitting as a Deputy High Court Judge)
[2020] EWHC 2175 (CH)

Royal Courts of Justice,
Strand, London, WC2A 2LL

Date: 04/08/2021

Before :

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LORD JUSTICE PETER JACKSON
and
LORD JUSTICE POPPLEWELL

- -

Between :

THE FINANCIAL CONDUCT AUTHORITY
(A Company Limited by Guarantee)

Claimant/ Respondent

- and -

(1) AVACADE LIMITED (in liquidation)
(trading as AVACADE INVESTMENT OPTIONS)
(2) ALEXANDRA ASSOCIATES (U.K.) LIMITED
(trading as AVACADE FUTURE SOLUTIONS)
(3) CRAIG STANLEY LUMMIS
(4) LEE EDWARD LUMMIS
(5) RAYMOND GEORGE FOX

Defendants/ Appellants

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David Berkley QC and Steven McGarry (instructed by **Zakery Khub Solicitors**) for the **Second, Third and Fourth Defendants/Appellants**
Nicholas Vineall QC and Adam Temple (instructed by **The Financial Conduct Authority)** for the **Claimant/Respondent**
The First and Fifth Defendants did not appeal

Hearing dates : 7 and 8 July 2021

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Approved Judgment

Lord Justice Popplewell :

Introduction

1. The Third Defendant ("CL") and Fourth Defendant ("LL") are father and son. They were directors of the Second Defendant ("AA"), and together with the Fifth defendant, Mr Fox, directors of the First Defendant ("Avacade"). Between 2010 and 2016 Avacade, and subsequently AA, operated a business scheme by which individuals were persuaded to transfer their pensions into self-invested personal pensions ("SIPPs"), and to direct the purchase of investments within those SIPPs into assets such as trees in Costa Rica and bonds relating to property developments in the USA and Brazil. Avacade and AA principally made its money from the commissions on these investment products, paid to them by the promoters of the investments. Avacade's activities led to 1,943 consumers transferring a total of about £87 million of pension funds into SIPPs, of which some £68 million was placed into investment products from which Avacade received commissions. The commissions amounted in total to over £10.5 million. AA's activities led to at least 59 consumers transferring a total of about £4.8 million of pension funds into SIPPs, of which around £905,000 was placed into a single product known as the Paraiba bond. Together with commissions on other investments, including the trees which had featured in the Avacade scheme, AA's commission amounted in total to £715,000. The consumers were not typically well-off: the average value of the pension pots in the Avacade scheme was about £45,000 and the average value for the AA scheme about £88,000.

2. CL, LL and Mr Fox constituted the core senior management of the business operation and worked together as a closely-knit group until CL and LL fell out with Mr Fox late in the life of the Avacade scheme. CL and LL each personally made some £2.5 million from the schemes. Mr Fox made some £1.7 million. The largest investment product across both schemes was in tree plantations in Costa Rica. Significant damage to the plantations was caused by Hurricane Otto in late 2016 and the Financial Services Compensation Scheme has made payments to UK investors on the basis that the underlying investment has nil value. Avacade and AA made over £5 million in commissions from this investment alone.

3. None of Avacade, AA, CL, LL or Mr Fox was an authorised person under the regulatory regime established by the Financial Services and Markets Act 2000 ("FSMA") and the Financial Services Act 2012 ("FSA"). The Financial Conduct Authority ("the FCA") brought proceedings against them for regulatory contraventions, seeking declarations and restitution orders and injunctions. Following the first part of a split trial, Adam Johnson QC, as he then was, sitting as a Deputy High Court Judge, ("the Trial Judge") held that the schemes involved:

   (1) contraventions of s. 19 of FSMA by (a) arranging deals in investments within the meaning of Article 25(2) of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("the RAO"); and (b) advising on investments within the meaning of Article 53 of the RAO;

   (2) contraventions of s. 21 of FSMA by making financial promotions; and

(3) contraventions of s. 89 of FSA (and in Avacade's case its predecessor, s. 397 of FSMA, in force prior to 1 April 2013) by making false or misleading statements to investors.

4. The Trial Judge further held that for the purposes of any restitution order to be made under s. 382 of FSMA, CL and LL were knowingly concerned in the contraventions of FSMA and FSA by Avacade and AA; and Mr Fox was knowingly concerned in the contraventions by Avacade.

5. The applications for interim restitution orders pursuant to s. 382 FSMA were heard by Mr Stephen Houseman QC, sitting as a Deputy High Court Judge (the "Remedies Judge"). The Trial Judge had recused himself for reasons which are not material to this appeal. The Remedies Judge made interim restitution orders against Avacade in the sum of £10 million; against AA in the sum of £715,000; against CL and LL in the sum of £2.5 million each; and against Mr Fox in the sum of £1.7 million. Those were, approximately, the amounts received by each of them from the schemes.

6. Avacade, which is in liquidation, and Mr Fox played no part in the trial or remedies hearings, and have not appealed. AA, CL and LL appeal against the order of the Trial Judge on four grounds for which permission was granted by Asplin LJ, permission being refused in relation to the remaining 24 grounds. The appellants also have permission from Asplin LJ to appeal against the order of the Remedies Judge insofar as it is consequential on the success of any appeal against the order of the Trial Judge. The appellants now seek to advance further grounds of appeal, for which they do not have permission, on the basis that the decision of this court in *Adams v Options UK Personal Pensions LLP* [2021] EWCA Civ 474, delivered since the two judgments and the decision of Asplin LJ on permission to appeal, provides further reasons for challenging the conclusions of the Trial Judge in respect of the contravention of s. 19 by reason of "making arrangements" within Article 25(2) of the RAO; and for challenging the interim restitution orders made by the Remedies Judge. No appeal is pursued against the Trial Judge's declarations that Avacade and AA contravened s. 19 FSMA by giving advice within the meaning of article 53 RAO; contravened s. 21 FSMA by making financial promotions; and contravened s. 397 FSMA and s. 89 FSA by making false or misleading statements to investors. Nor is there any appeal challenging the decision that CL and LL were knowingly concerned in those contraventions. Although there is no appeal by Avacade against any of the findings, contravention by Avacade is in issue on the appeals by CL and LL because of the appeal by those individuals against the finding that they were knowingly concerned in Avacade's "making arrangements" contravention.

The facts

7. I take the facts from those found by the Trial Judge in his careful and comprehensive judgment.

8. Under the Avacade scheme operating between 2010 and 2014, consumers who had existing pensions were contacted by telephone. They were provided with a report on their current pension position. The existing pensions were mostly occupational pension schemes, with a few being personal pensions. A good many of the customers who were contacted transferred their existing pension funds into SIPPs, on Avacade's advice. The SIPP provider initially used was Berkeley Burke Sipp Administration Ltd, but for the

bulk of the period of the Avacade scheme the SIPP providers were Liberty and Guinness Mahon. I consider the entities involved and the terms of those SIPP arrangements below. Within those SIPPs, the consumers directed the purchase of the following investments:

(1) *Hotpods*: these were commercial office spaces, in which £602,470 was invested producing commission of £129,830;

(2) *Mosaic Caribe*: these were investments in life insurance policies, in which £555,479 was invested, producing commission of £35,216;

(3) *Sustainable AgroEnergy*: this was green oil from crops in Thailand, Cambodia and the Philippines, in which £1,244,479 was invested producing commission of £203,244;

(4) *Ethical Forestry*: these were melina trees in Costa Rica, in which £42,600,452 was invested, producing commission of £5,335,260.56;

(5) *Global Plantations*: these were teak trees in Malaysia and Sri Lanka, in which £12,327,700 was invested, producing commission of £2,579,657.50;

(6) *InvestUS* and *Re-Invest USA* (or "*REIUSA*"): Avacade's accounting records did not distinguish between these, but they were separate bonds financing US real property transactions; in total, £11,438,600 was invested generating commission of £2,327,415.

9. Apart from the InvestUS and REIUSA bonds, the investments were made directly in the property concerned, for example the trees or offices themselves, and as such those investment products were not within the definition in the RAO of regulated investments.

10. The investments in the unregulated products in the Avacade scheme were made by the SIPP providers on an "execution only" basis, that is to say, simply on the customer's instructions without any investment advice from the SIPP provider or an independent financial advisor ("IFA"). The consumers in the Avacade scheme chose those products because they were promoted by Avacade. Before investing in the Avacade bond products (InvestUS and REIUSA), which were regulated investments, investors were referred to Cherish Wealth Management Ltd ("Cherish") which was the authorised representative of an IFA. The Trial Judge found that Cherish had a limited role which did not involve providing independent advice on the appropriateness of the bond products, or any comment on the suitability of other products, but merely a generic risk profile assessment of the customer.

11. There is some uncertainty about when Avacade's operations came to an end and those of AA commenced, and there was some period of overlap. AA was in operation by early 2015, by which time there had been a falling out with Mr Fox who was no longer involved. AA traded as "Avacade Future Solutions" and purchased from Avacade its list of consumers whose pension transfers were not completed. Under AA's operations there were investments in the unregulated products which were part of the Avacade scheme, including Ethical Forestry and Global Plantations. AA's operations came to be focussed, however, on another investment, namely a bond to finance residential

building construction in the Paraiba region of northeast Brazil ("the Paraiba bond"). £905,000 was invested in the Paraiba bond, producing commissions of £226,250. Although this did not account for more than about 20% of AA's activity in terms of amounts invested, it is this aspect of its business which has come to be referred to as the AA scheme. Guinness Mahon was the SIPP provider for all the AA transactions.

12. Under the AA scheme, the consumers were referred to a different IFA, BlackStar Wealth Management A Ltd ("BlackStar") which was the appointed representative of BlackStar Wealth Management Ltd, an authorised IFA. BlackStar's role was supposedly to advise both on the pension transfer and on suitable investments, but the Trial Judge found that the report provided by BlackStar was in a pro forma format and "formulaic", and that the service it performed was too narrowly focussed to amount to independent investment advice either in relation to the SIPP transfer or the investment in the Paraiba bond. BlackStar paid AA an "administration fee" of £95 per customer for the latter's part in informing the customer about the Paraiba bond.

13. The AA scheme came to an end following an investigation by the FCA in 2016.

Steps in the Avacade scheme

14. The essential steps in the Avacade scheme were as follows.

    (1) Consumers were contacted by phone by Avacade agents with a view to the consumer commissioning a free pension report from Avacade. About three-quarters of the contacts were made on behalf of Avacade by personnel in a call centre in Bournemouth which had been made available to Avacade by Ethical Forestry, with the remainder being made by Avacade staff themselves. If the consumer elected to proceed, they would be sent a letter of authorisation ("LoA") together with a signature pack, enabling Avacade to obtain information about their existing pension directly from their pension provider. The typical arrangement involved documents being provided by Avacade to a courier company, who would attend the consumer's address with the materials to be signed, and the documents were then sent back via the same courier to Avacade's offices.

    (2) The next step was a welcome call from the Avacade agent to the consumer, to confirm receipt of their pension information and to obtain any necessary clarifications. Avacade then contacted the consumer's existing pension provider using a covering letter and the LoA.

    (3) On the basis of the information received from the existing pension provider, a draft pension report would be prepared. Before it was sent to the consumer there would be a further pre-report call, in which Avacade contacted the consumer again to ask a series of questions about issues affecting their pension provision and retirement plans.

    (4) The finalised Pension Report would then be sent to the consumer. All versions identified a set of options from which consumers could choose, the fourth of which was transfer of the pension into a SIPP.

(5) The consumer was then contacted by Avacade to discuss the options identified in the Pension Report in what was termed the Report Call. It involved Avacade giving advice that transfer into the SIPP was the best course to take.

(6) If the consumer made the decision to transfer into a SIPP, transfer forms were completed by Avacade and sent by courier to the consumer to sign and return.

(7) There was a then a further call between the consumer and an Avacade agent, this time to discuss the investments to be made with the funds transferred into the SIPP. This was referred to as the Investment Call. During this call the Avacade agents gave advice recommending investment in the products from which Avacade would receive commission.

(8) Avacade took steps to supply paperwork relating to the investment to the consumer for signature, which was returned to Avacade, who would then co-ordinate with the product provider and the SIPP administrator. Where the investment options included the InvestUS or REIUSA bond (after June 2012), there was discussion about the amount that might be invested. In those cases Cherish had the limited involvement referred to above.

Steps in the AA scheme

15. The steps involved in the new AA model for the Paraiba bond investment were similar but not identical to those in the Avacade scheme, involving the following:

(1) Initial contact with the consumer was established in a similar way to that in the Avacade model. Consumers who expressed an interest as a result of the initial call were provided by AA with an LoA on BlackStar headed paper together with an AA signature pack. By mid-2015 the practice seems to have involved clients also being sent a BlackStar client agreement by AA for signature at the same time. Some investors were provided with the documents electronically for electronic signature. For others the courier procedure was used.

(2) After using the LoA to acquire details of the customer's existing pension arrangements, AA made a pre-report call followed by provision of the pension report. This operated in much the same way as under the Avacade model.

(3) The Report Call was similar to that in the Avacade model, and also involved giving advice that transfer into the SIPP was the best course to take. It ended differently in that all consumers who wished to proceed were referred to the IFA, BlackStar. During this call the AA agent would also complete a "Risk Questionnaire".

(4) The Investment Call by AA to the consumer was made prior to any discussion with BlackStar. It was to provide information about the Paraiba bond along the lines of the information contained in the Paraiba brochure, which had been sent to the consumer by post. The Trial Judge found that it involved advice to invest in Paraiba in some but not all cases. It is not clear from the findings whether the Investment Call took place before or after the so-called Fact Find and Appointment Call by AA personnel. This may have been a single call or two separate calls. The Fact Find was based on a financial questionnaire which

included questions about income, assets, liabilities and retirement planning. The Appointment Call was to set up an appointment with BlackStar. The Appointment Call involved telling the consumer that BlackStar would have a discussion about the Paraiba bond, which had already been discussed with the consumer.

(5) The consumer would then have a telephone conversation with a Mr Hillas at BlackStar, who was not in fact an authorised advisor. The purpose of the call was for Mr Hillas to validate the information which he had already received via AA, in the Risk Questionnaire completed by AA. BlackStar did not however, seek to verify the information in the Fact Find.

(6) On at least some occasions, there was a further call between the consumer and an AA agent. This call was used as an opportunity to enquire whether BlackStar had supported the allocation of the amount of the pension pot to be invested in the Paraiba bond which had earlier been discussed, and if not, to assess whether steps might be taken to increase the recommended amount.

(7) BlackStar produced a financial planning report for the consumers. The report had a focus on the Paraiba bond, and fell short of independent financial advice as a result of the deficiencies identified above.

16. Because AA was disappointed with the proportion of funds invested into the Paraiba bond by consumers, a variation was explored under which the funds not destined for the Paraiba bond would be invested by being placed with a discretionary fund manager, Beaufort Securities. £85,639 was received by AA in commissions from Beaufort.

The regulatory framework

17. Section 19 of FSMA provides for a general prohibition on any regulated activity by anyone other than an authorised or exempt person. Section 22 of FSMA provides that:

> "(1) An activity is a regulated activity for the purposes of this Act if it is an activity of a specified kind which is carried on by way of business and –
>
> (a) relates to an investment of a specified kind; or
>
> (b) in the case of an activity of a kind which is also specified for the purposes of this paragraph, is carried on in relation to property of any kind.
>
> …
>
> (5) 'Specified' means specified in an order made by the Treasury."

18. The relevant order specifying regulated activities and regulated investments for the purposes of s. 22 is the RAO.

19. Part III of the RAO sets out at articles 76 to 82 the investments specified for the purposes of s. 22. They include bonds, but do not include the other product investments which were made by consumers in the Avacade and AA schemes. By article 82(2), however, "rights under a personal pension scheme" are designated as specified investments.

20. Article 25 of the RAO provided at the material times:

"**Arranging deals in investments**

> "25. (1) Making arrangements for another person (whether as principal or agent) to buy, sell, subscribe for or underwrite a particular investment which is—
>
> (a) a security;
>
> (b) a relevant investment…
>
> is a specified kind of activity.
>
> (2) Making arrangements with a view to a person who participates in the arrangements buying, selling, subscribing for or underwriting investments falling within paragraph (1) (a), (b)… (whether as principal or agent) is also a specified kind of activity.
>
> …"

21. Article 3 of the RAO defines a security as meaning any of the investments specified in articles 76 to 82 and accordingly includes rights under the SIPPs in this case, which are rights under a personal pension scheme; and the InvestUS, REIUSA and Paraiba bonds involved in this case; but would not include direct investment in the other products such as the trees. Article 3 defines buying as including "acquiring for valuable consideration" and selling as including:

> "disposing of the investment for valuable consideration, and for these purposes "disposes" includes-
>
> (a) In the case of an investment consisting of rights under a contract-
>
> (i) surrendering, assigning or converting those rights; or
>
> (ii) assuming the corresponding liabilities under the contract;
>
> (b) in the case of an investment consisting of rights under other arrangements, assuming the corresponding liabilities under the arrangement."

22. Article 26 of the RAO provides:

> "26. There are excluded from articles 25(1), 25A(1), 25B(1), 25C(1) and 25E(1) arrangements which do not or would not bring about the transaction to which the arrangements relate."

23. Article 29 of the RAO provides:

> "**Arranging deals with or through authorised persons**
>
> 29. (1) There are excluded from articles 25(1) and (2) … arrangements made by a person ('A') who is not an authorised person for or with a view to a transaction which is or is to be entered into by a person ('the client') with or through an authorised person if—
>
> (a) the transaction is or is to be entered into on advice to the client by an authorised person; or
>
> (b) it is clear, in all the circumstances, that the client, in his capacity as an investor … is not seeking and has not sought advice from A as to the merits of the client's entering into the transaction (or, if the client has sought such advice, A has declined to give it but has recommended that the client seek such advice from an authorised person).
>
> (2) But the exclusion in paragraph (1) does not apply if—
>
> …
>
> (b) A receives from any person other than the client any pecuniary reward or other advantage, for which he does not account to the client, arising out of his making the arrangements."

24. Article 33 of the RAO provides as follows:

> "**Introducing**
>
> 33. There are excluded from articles 25(2), 25A(2), 25B(2), 25C(2) and 25E(2) arrangements where—
>
> (a) they are arrangements under which persons ("clients") will be introduced to another person;
>
> (b) the person to whom introductions are to be made is [an authorised or exempt person or person lawfully carrying on regulated activities];
>
> (c) the introduction is made with a view to the provision of independent advice or the independent exercise of discretion in relation to investments generally or in relation to any class of investments to which the arrangements relate …"

25. Article 53 of the RAO makes advising on the merits of buying, selling, subscribing for or underwriting a security or relevant investment a specified regulated activity.

Adams

26. The Trial Judge analysed the transactions in the schemes as involving four steps: (1) transfer out of the consumer's existing pension; (2) transfer into the new SIPP; (3) divesting cash from within the new SIPP; and (4) purchase of one or more of the investment products promoted by Avacade/AA. He held that step 1 did not involve regulated activity because the existing pensions were largely occupational schemes and the FCA chose not to rely on the few examples of transfer out of personal pension schemes; that step 2 did involve regulated activity because it involved acquiring rights under a personal pension scheme; and that steps 3 and 4 involved regulated activity, even where the products were not themselves specified investments, because they involved the member buying or selling rights under the SIPPs.

27. In the oral argument addressed on the appeal, the appellants contended, and the FCA accepted, that the effect of the decision of this Court in *Adams* was that steps 3 and 4 did not themselves constitute the buying and selling of securities by the consumer. The Master of the Rolls pointed out during the hearing that the terms of the Liberty SIPP arrangements to which we were briefly taken appeared to be different from those in *Adams*, such that the decision might not apply to steps 3 and 4 in this case. The parties were invited to make written submissions on the point following the hearing and did so, along with which we were provided with the terms of the SIPP in the *Adams* case and the terms of the Liberty and Guinness Mahon SIPPs which formed the vast majority of the SIPPs used by Avacade and AA. The FCA's position was that the difference in terms between the SIPP used in *Adams* and the SIPPs used by Avacade/AA did not affect the applicability of the reasoning in *Adams* with the result that steps 3 and 4 did not involve the buying and selling of securities by the consumer. Unsurprisingly, the appellants concurred.

28. For my part I have considerable reservations as to whether that is correct. In *Adams*, there were arrangements under which CLP Brokers Socieded Limitada ("CLP") persuaded consumers, one of whom was Mr Adams, to move their pensions into an execution only SIPP operated by Carey Pensions UK LLP ("Carey") and invest in long leases in storage facilities in Blackburn, Lancashire referred to as "storepods", with a view to generating income from sub-letting. Carey was an authorised entity; CLP was not. Mr Adams brought proceedings against Carey to rescind the SIPP arrangements under s. 27 FSMA on the grounds that CLP had been in breach of article 25 of the RAO in making arrangements for the transfers. The decision of this Court on appeal was that there was no breach of article 25 in CLP making arrangements for the investment in the storepods from within the SIPP, which was not regulated activity; but that there was a breach of article 25(1) in making the arrangements for the initial transfer of the pension pot out of Mr Adams' existing SIPP, which was a personal pension, and therefore involved disposing of personal pension rights which is a specified investment.

29. Carey's SIPP scheme was constituted by a declaration of trust which provided for the establishment of a pension scheme to be governed by attached rules. Carey was appointed as the scheme administrator and Carey Pension Trustees UK Ltd ("Carey Trustees") as the scheme trustee. The rules provided for Carey Trustees to hold the

assets of the pension scheme at the disposal of Carey, which was to apply the fund upon the trusts to provide benefits in accordance with the rules. No member of the pension scheme was to have any claim, right or interest in respect of the fund except under the rules, but the parts of the fund which Carey determined to be attributable to particular members ("Individual Funds") were to be applied in securing benefits in respect of those members and their dependants. There was provision for income withdrawal, lump sums and death benefits. Carey was given full powers of investment, but, in relation to an Individual Fund, was generally to exercise those powers only in accordance with any directions given by the relevant member or dependant. Carey could opt to transfer an Individual Fund, or an amount representing it, to another pension scheme or to buy out a member's benefits by arranging for them to be secured with an insurance company.

30. The leading judgment was given by Newey LJ, with which Rose and Andrews LJJ agreed. Andrews LJ delivered a concurring judgment. Newey LJ addressed the issue whether investment in the storepods was a regulated transaction at [53ff]. He identified at [55] the argument for Mr Adams, and for the FCA who intervened, that although the storepods were not themselves a "security" or "relevant investment", the investment in them involved "converting" Mr Adams' rights under the SIPP from rights to cash to rights relating to the storepods; or that the change of rights occurring on the investment should be regarded as "disposing … for valuable consideration" within the meaning of the RAO. At [61] and [63] he recorded the submissions of Mr Moeran QC for Carey that the SIPP was not an investment "consisting of rights under a contract"; but that even if it were, a change in the assets within a SIPP did not involve either "converting" rights or "disposing [of rights] for valuable consideration"; the pension rights might be calculated by reference to the value of a different asset but the rights themselves were unchanged. Mr Moeran stressed that the holder of the SIPP had neither a legal nor a beneficial interest in the assets; the member did not have any entitlement to the property itself.

31. Newey LJ went on at [64]-[65] as follows:

> "64. In my view, Mr Moeran is right about this. In the first place, I agree with him that Mr Adams' rights under the SIPP are not "rights under a contract". A member of the Carey pension scheme such as Mr Adams enjoys his rights pursuant to the trusts established by the declaration of trust dated 27 July 2009, which provided for the scheme to be governed by the rules in respect of it. It is true that the terms and conditions to which Mr Adams assented when he applied to join the scheme contain provisions relating to it, stating for example "You may direct us to invest amounts held for your fund". However, the terms and conditions explain that the scheme "has been established and is governed by the Rules" and that "If there is any inconsistency between the detail set out in these terms and conditions and the provisions of the Rules, the Rules prevail". The terms and conditions sought, as they said, to "[set] out the main terms and conditions of the scheme", but someone joining the scheme essentially acquired rights under trusts governed by the scheme rules. If the terms and conditions can be said to have given a member a contractual right to direct how Carey invested, it was a right to control the way in which Carey exercised its powers under the rules. It remains the case that a member's rights under the Carey pension scheme were not fundamentally contractual.

> 65. In any case, I do not think a member of the Carey pension scheme "converts", "disposes of" or "sells" his rights merely by altering the underlying investments. A member of a pension scheme may, in the words of the Treasury consultation paper, have a "right to receive sums determined by reference to the value or performance of the underlying property", but he is not the property's owner. In fact, the rules governing the Carey pension scheme state in terms that "No person shall have any claim, right or interest in respect of the Fund except under the Rules". There can therefore be no question of a member acquiring different property rights as a result of a switch in investments. The rules give a member and dependants rights to certain benefits the value of which will be a function of the value of the investments, but the rights are not themselves transformed by changes in either the value or the make-up of the relevant investments. In the circumstances, the words "sell", "dispose of" and "convert" are not, in my view, apt to describe what occurs when one investment is substituted for another. A member retains his rights under the SIPP and does not "sell", "dispose of" or "convert" them."

32. The terms of the Liberty and Guinness Mahon SIPP schemes differ from the Carey SIPP scheme in what I would regard as an important way. In the Liberty scheme, the scheme establisher and operator is Liberty Sipp Ltd ("Liberty"). The scheme involves a declaration of trust registered under part IV of the Finance Act 2004 of which Liberty Trustees Ltd ("Liberty Trustees") is the trustee, together with accompanying rules. The Trust Deed and rules provide in schedules for rights of the member to be provided under three sub-trusts, including one in relation to his individual SIPP arrangements. There is a supplemental trust deed, executed by the member and Liberty Trustees, by which the member is a joint trustee of the assets forming his individual SIPP arrangement, and in which Liberty Trustees' role in holding the assets jointly with him is expressly limited to that of a bare trustee, without any power, duty, discretion or ability to act other than in accordance with the instructions of the scheme administrator (i.e. Liberty), with whom the member is to act unanimously. Under the terms and conditions, the member is entitled to direct the manner in which the funds in the individual SIPP arrangement are invested, and Liberty and Liberty Trustees are to follow such instructions, subject to a discretion not to do so in cases of incapacity, mental illness, illegality or other circumstances rendering it inappropriate. Only in cases of purchase of commercial real property is it provided that the purchase shall be in the name of Liberty Trustees alone. Liberty Trustees is to be the sole signatory on the bank account and so, in practice, to implement the investment decisions, but the legal ownership will be vested in the member and Liberty Trustees jointly. The assets are held in accordance with the scheme rules under the sub-trust.

33. The Guinness Mahon scheme is in equivalent terms, under which there is again a sub-trust deed executed by the scheme trustee and the member whereby the individual investments are to be held by them as joint trustees.

34. The FCA's written submissions contend that the fact that in these schemes the member is legal owner of the investment makes no difference to the analysis of Newey LJ in *Adams* or to the fact that steps 3 and 4 in this case do not constitute regulated investment activity. My instinctive reaction is that it makes all the difference. If the investments are in regulated products, such as the bonds, I would have thought that the purchase of them by the member as a joint trustee involved him "buying" a qualifying security; and that in relation to the unregulated products, such as the trees, the member is acquiring

a new legal right under the SIPP scheme, as joint trustee of the sub-trust, and therefore "buying" a "security", because he acquires a new right under a personal pension by acquisition of legal ownership of an asset held under the terms of the scheme rules. He is also, I would have thought, exchanging a right under the scheme in the form of ownership of cash for a right under the scheme in the form of ownership of the product, such that he is disposing of rights under a personal pension scheme, i.e. a security, for valuable consideration. His rights under the scheme do not remain the same, as Newey LJ held that Mr Adams' rights did under the Carey scheme where there could "be no question of the member acquiring different property rights as a result of a switch in investment".

35. I would not find it a surprising result if the involvement of a personal pension scheme were to bring investment in unregulated products within the scope of regulation. The designation in article 82(2) of the RAO of rights under a personal pension as a regulated investment, so as to provide the consumer protection inherent in the regulatory regime, no doubt reflects a policy that personal pension savings are of a kind which deserve particular protection for financially unsophisticated individuals against high risk investments, protection which does not apply to the same investments which consumers can afford without recourse to the savings which are to support them in old age. This is of importance following the liberalisation of the pension regime, as a result of which investments made within personal pensions are no longer necessarily made on the judgment of pension trustees and administrators who are themselves regulated.

36. I recognise, however, that we have not had adversarial argument on the point and that the FCA has made a clear concession, of which the appellants are entitled to take advantage. I will therefore proceed upon the assumption that steps 3 and 4 did not involve relevant regulated investment activity, whether in the bonds or the unregulated products, despite my reservations as to whether that is correct. The assumption applies to both the unregulated and regulated products. Purchase of the bonds by the scheme trustees would still be regulated activity by them, but would be irrelevant in the light of the way the FCA chose to advance the case. Article 25(2) requires the specified investment to be made by a person who participates in the arrangements. In this case that would include the consumer but not the SIPP trustee. If the arrangement was for investment in a regulated investment by someone other than the consumer, the activity could not fall within Article 25(2) which was the provision upon which the FCA relied. Article 25(1) would potentially apply to that investment activity by the scheme trustees, but the FCA did not advance a case of contravention of article 25(1).

The appeal from the Trial Judge

The existing and new grounds of appeal

37. Of the grounds for which Asplin LJ gave permission, grounds 1 to 3 challenge the reasoning and findings of the Trial Judge on the application of article 25(2). Ground 9 challenges his construction of article 33(c). The new proposed grounds on the appeal from the Trial Judge seek to contend at (1) that the decision in *Adams* has the consequence that there was no buying and selling of securities by the consumer in steps 3 and 4, as now conceded by the FCA; at (2) that the consequence is that article 29 is engaged; and at (6) and (7) that the consequence is that article 33 is engaged. New draft grounds (3) to (5) were not pursued. In the second appeal, from the Remedies Judge, there is a new proposed ground that because the effect of *Adams* is that the regulated

activity was confined to step 2, the interim restitution orders were not properly made by reference to the commission received from the investment products, which was the unregulated activity in steps 3 and 4.

38. It is important to keep in mind the procedural position in relation to the proposed new grounds of appeal. Where an appellant has been granted permission to appeal to the Court of Appeal, and seeks to raise a new argument which is not covered by the grounds for which he has permission, the court has a discretion to allow the grounds to be amended to raise the new point pursuant to CPR 52.17, provided the ground has not been the subject matter of a prior refusal of permission by the Court of Appeal. Where permission has already been refused on that ground, however, the position is different. In those circumstances an application to amend the grounds is an application to reopen the decision refusing permission and must be made under CPR 52.30, which deals with reopening of final appeals and provides by 52.30(2) that for these purposes an appeal includes a decision on permission to appeal. Such an application can only succeed in the highly restricted circumstances identified in that rule, in accordance with the principles in *Taylor v Lawrence* [2002] EWCA Civ 2009 [2002] QB 528 and the subsequent authorities considered and summarised in the recent decision of this Court in *Municipio de Mariana v BHP Group Plc* [2021] EWCA Civ 1156.

39. As will be seen, some of the new proposed grounds involve seeking to raise points on which Asplin LJ refused permission. As such they engage CPR 52.30. The sole basis advanced in support of the application to amend so as to raise the new grounds is the decision in *Adams*. Even if that case involved a relevant change in the law, that would not be sufficient to satisfy the restrictive criteria which apply. The common law develops incrementally, but the public and private interest in the finality of litigation, which lies behind CPR 52.30 and the *Taylor v Lawrence* line of jurisprudence, dictates that litigants should not be permitted to reopen decisions whenever such a development occurs. Otherwise there would be no end to re-litigation.

40. In fact *Adams* involved no change in the law. It was always open to the appellants to argue before the Trial Judge that steps 3 and 4 involved no buying or selling of securities on the part of the consumers, and there was no case law which precluded such an argument. If the effect of *Adams* is as assumed for the purposes of this appeal, it did not change the law but merely demonstrated that the appellants' stance at trial involved a mistaken failure on their part to advance an available argument. As Longmore LJ observed in *R (Nicholas) v Upper Tribunal (Administrative Appeals Chamber)* [2013] EWCA Civ 799 at [20], such mistakes are not exceptional at all and are insufficient to satisfy the stringent criteria required by CPR 52.30.

41. Mr Berkley QC argued that he did not need to rely on CPR52.30 and that there was a residual discretion to allow permission to rely on new grounds irrespective of any refusal of permission by Asplin LJ. He referred to *Miriki v Bar Council* [2001] EWCA Civ 1973; [2002] ICR 505 at [28]; and *Yorkshire Bank plc v Hall* [1999] 1 WLR 1713 at p 1725C-H. The former was concerned with appeals from the EAT and does not in any event support the existence of a residual discretion where permission has been refused. The latter was concerned with the position under the old Rules of the Supreme Court and prior to the decision of the five member constitution of this court in *Taylor v Lawrence* and the subsequent jurisprudence; and prior to the introduction of CPR 52.30 itself. Neither case provides any sound basis for the existence of a residual discretion to reopen decisions refusing permission to appeal where CPR 52.30 is not satisfied.

Article 25(2)

42. On the application of article 25(2), the Trial Judge first addressed the authorities on the concept of "making arrangements". He referred to the decision of Mr Jonathan Crow QC, sitting as a Deputy Judge of the High Court in *In re The Inertia Partnership LLP* [2007] EWHC 539 (Ch), [2007] Bus LR 879, a case on article 25(1), in which what was said at [39] suggested a very broad interpretation, but insufficiently broad to cover one particular aspect of the arrangements in that case which involved a mere introduction which would not necessarily involve anything further happening (at [40]). The Trial Judge referred to the decision of Holroyde J, as he then was, in *Watersheds v DaCosta* [2009] EWHC 1299 (QB), a case on both articles 25(1) and (2), in which it was held that an agreement by a company to provide advice to the defendant in relation to its efforts to raise finance amounted to no more than a mere introduction so as to fall outside the scope of article 25(1). Holroyde J also held that article 25(2) was applicable only where the assistance was given to both parties to a potential transaction rather than only one of them. The Trial Judge referred to the decision of this court in *SimplySure Ltd v Personal Touch Financial Services Ltd* [2016] EWCA Civ 461, [2016] Bus LR 1049 in which it was held at [26] that a person who interviewed a client to complete part of a "fact find" with a view to him potentially buying a regulated product from a third party contravened articles 25(1) and (2). The trial Judge also referred to the dictum of Lord Sumption JSC at [91] of *Asset Land Investment Plc v The Financial Conduct Authority* [2016] UKSC 17, [2016] Bus LR 524, in another context within FSMA, that "'arrangements' is a broad and untechnical word"; and to the first instance decision of HHJ Dight in *Adams* [2020] EWHC 1229 (Ch) which held that the storepod investments were "too far down the chain of causation" to satisfy article 25(1). The Trial Judge concluded that these authorities were not without difficulty, in particular because it was difficult to square the conclusion in *Watersheds v DaCosta* that providing assistance to one party does not constitute making arrangements under article 25(2) with the conclusion in *SimplySure* that assisting one party in relation to completing a fact find did constitute making arrangements under that article. At [227] he said that that the language of article 26 was illuminating in excluding from article 25(1), but not article 25(2), arrangements which do not bring about a transaction; and that the language in article 25(2) of arrangements "with a view to" a transaction involved a broader and more inchoate test of causation which would include helping to bring about a transaction. At [228] he concluded that "making arrangements" under 25(1) therefore had to be approached differently from "making arrangements" under article 25(2); and that the latter applied to assistance provided to one party only to a potential transaction, in accordance with the decision in *SimplySure* and the language of article 25(2) referring to "a person".

43. In applying those principles to Avacade and AA, the Trial Judge identified the particular steps in the process of both Avacade and AA which constituted making such arrangements, being most of those I have identified earlier. In doing so, he first observed at [234] that the real prize for Avacade was an investment in one of the products on which it could earn commission; and that therefore the attraction of sourcing consumers who would agree to transfer their existing pension pots into a SIPP was obvious in that it would provide both a source of funds and a vehicle or "wrapper" through which that could happen.

44. This paragraph was one of many in which he made clear findings that the sourcing of funds from pension pots, transfers into SIPPs and investment in the products producing commission, were all part of an indivisible whole in the arrangements made for each customer by both Avacade and AA. Without the use of pension pots and transfer into a SIPP, the funds would not be available for investment in the products; without investment in the products, Avacade would not earn its commission which was the whole point of the business venture. Neither aspect was intended to take place in isolation, and it was critical to the whole business model that there be both pension transfer into the SIPP and investment in the identified products from within the SIPP. Steps 1, 2, 3 and 4 were not in substance "distinct and non-dependent" or "divisible" but rather were part of "a seamless whole"; "in truth it was all one set of arrangements"; "the earlier parts of the process were designed to bring about a situation in which the later parts could happen"; the whole infrastructure of the model "was geared around identifying consumers with pension pots that might be transferred into a SIPP, thus providing an available fund from which the investments could be acquired"; "[t]he SIPP transfer was not an end in itself; it was a staging post along the road to the ultimately desired outcome"; "[t]he purchase of the investments does not stand alone; it is indivisible from what has to happen within the SIPP to allow the purchase to occur"; in assessing what the arrangements were '*with a view to*', "the real purpose of the arrangements…was to seek to bring about a situation in which the desired investments would be made and the commission earned", both "looked at as a whole" and for "any of the individual steps, looked at alone if the overall context is borne in mind". See [186(iii)], [231(ii)], [234], [248(ii), (v), (vi)], [253], [254], [376], and [377]. "The preparation and presentation of the Pension Report, for example, would still on this analysis have been undertaken '*with a view to'* facilitating the transfer of existing pension funds into a SIPP and the eventual acquisition of investments from which Avacade would make a commission" (at [272]).

45. At the risk of failing to do them justice by oversimplifying, Mr Berkley's arguments in support of grounds 1 to 3 may be summarised as follows:

    (1) Because there are criminal consequences arising from contravention of s. 19 FSMA, the court should adopt a narrow construction of article 25(2) in case of ambiguity. Mr Berkley relied upon *Agassi v Robinson (Inspector of Taxes) (No 2)* [2005] EWCA Civ 1507 as an illustration of this principle.

    (2) The Trial Judge erred in attributing a different meaning to the words "making arrangements" in article 25(1) from that attributed to the same words in article 25(2); they should be read consistently as meaning the same thing.

    (3) The Trial Judge erred in failing to treat article 25(2) as requiring a direct and instrumental link by way of causation between the arrangements and the potential investment activity they were to bring about; by analogy with article 26, there must be a notional causative link of "bringing about" the transactions.

    (4) Accordingly the Trial Judge erred in his findings on "making arrangements" by not applying the correct causation test.

46. I cannot accept these arguments. Mr Berkley's point on criminal consequences is counterbalanced by the regulatory purpose of the statutory framework identified in sections 1A to 1H of FSMA, and in particular that of protection of consumers. For this

reason it is not appropriate to adopt a narrow construction on the grounds that s. 23 FSMA imposes penal sanctions for contraventions. What is required is simply a fair reading of the ordinary meaning of the words in the light of the overall purpose of the section in its statutory framework. See *Financial Conduct Authority v Capital Alternatives Ltd* [2015] EWCA Civ 284, [2015] Bus LR 767 per Christopher Clarke LJ at [78]-[79]. *Agassi* is of no relevance, being a decision on particular wording in a different context, in a case where the statutory provisions imposed strict liability, whereas criminal liability for contraventions of s. 19 FSMA are subject to a defence under s. 23(2) FSMA of taking all reasonable precautions and exercising all due diligence to avoid the contravention.

47. There are three relevant differences between articles 25(1) and 25(2), each of which is concerned with "making arrangements" in relation to the buying and selling of securities (among other things). The first is that 25(1) applies to making arrangements "for" the buying and selling of securities, whereas 25(2) applies to making arrangements "with a view to" that activity. The second is that for article 25(1) the buying or selling may be conducted by anyone, whereas for article 25(2) it must involve a person who participates in the arrangements. I agree with the Trial Judge that both the language of the article ("a person") and the decision of this Court in *SimplySure* make clear that the relevant transactions contemplated need only involve one of the parties to the arrangements, not both. The third difference is that article 26 provides an exception to article 25(1) but not article 25(2).

48. Article 26 excludes from the operation of article 25(1) arrangements which do not or would not bring about the transactions to which the arrangements relate. The words "would not" make clear that even article 25(1) is not concerned only with arrangements which successfully result in a relevant transaction; a person may contravene article 25(1) by making arrangements "for" such a transaction which does not in fact take place. Nevertheless article 26 introduces an actual or notional test of causation ("bring about") in relation to arrangements for the purposes of article 25(1). In *Adams* the court held that the degree of causal potency required was that for arrangements to "bring about" a transaction they must play a role of significance but need not involve a direct connection (see [97]). Importantly, however, article 26 is expressly confined by its terms to article 25(1) and other articles; it does not apply to article 25(2), as this court confirmed in *SimplySure* at [26]. There is no need to introduce any test of causation into 25(2) by reference to the language of the inapplicable article 26 because by using the words "with a view to", article 25(2) makes clear that it is concerned with the purpose of the arrangements. An intended purpose, an end in view, must be that a relevant transaction take place, but the arrangements do not need to bring it about by way of an actual or notional test of causation. These are wide words which suggest that all that is necessary is that a relevant transaction is part of the purpose of making the arrangements. A person may have a relevant transaction as an end in view where the arrangements do no more than create or facilitate a situation which provides the opportunity for it to take place. That may be an intended result notwithstanding that the arranger is powerless to ensure that it takes place or even influence the decision which leads to it taking place. You cannot make the proverbial horse drink, but taking it to water involves making arrangements with a view to it drinking.

49. The word "arrangements" does not of itself have a different meaning in article 25(1) from that in 25(2), but the arrangement in any particular case may qualify as a

contravention of one but not the other by reference to the differences of wording to which I have drawn attention. I do not think that the Trial Judge was saying any more than that in the passage criticised by Mr Berkley, focussing as he did on the need in article 25(2) for one of the parties to the arrangement to be involved in the buying or selling of securities.

50. Moreover, and whatever test of causation is adopted, I entertain little doubt that on the Trial Judge's findings the arrangements made between Avacade/AA and the consumers, SIPP providers and product providers, were with a view to transfer of pensions into the SIPPs and with a view to the subsequent investments in the products. Both were the dominant purpose with which the whole business model was conceived and implemented, and the arrangements played a significant part in bringing about both those consequences.

51. Mr Berkeley's principal argument on article 25(2) was that covered by his new draft ground (1) of appeal, based on the assumed effect of *Adams*, that steps 3 and 4 did not involve regulated activity, and that the only regulated activity arose from step 2, the consumer entering into the SIPP arrangements. He argued that since the real end in view was the commission producing investment in the products at steps 3 and 4, and step 2 was not an end in itself, article 25(2) was not engaged.

52. This is to ignore both the Trial Judge's findings and the reality of the schemes. As the Trial Judge found, the schemes were an indivisible and seamless set of arrangements as a whole, of which entry into the SIPPs was a necessary and critical part because access to pension pots was the essential source of funding for the investments. Step 2 was a specific and necessary purpose of the arrangements. Moreover, because all the steps formed part of an indivisible single set of arrangements, it is inappropriate to compartmentalise the steps in the arrangements for the purposes of article 25(2).

53. The point was made forcefully in *Adams* itself. At [67] and [68] Newey LJ said that advice on the merits of an unregulated investment is sometimes capable of constituting advice on a specified one and so being regulated activity. He cited with approval what was said by the Upper Tribunal in *Burns v Financial Conduct Authority* [2018] UKUT 246 (TCC) about the possibility of a customer being advised on an indivisible package of rights which includes the rights arising out of the particular assets to be included in the particular scheme; and Ouseley J's reference, in the same vein, in *R (TenetConnect Services Ltd) v Financial Ombudsman* [2018] EWHC 459 (Admin), [2018] 1 BCLC 726 to a "single braided stream of advice" given on regulated and unregulated investments. Andrews LJ emphasised at [133] the importance of standing back and looking at the conduct of the unregulated entity holistically. The principle was applied in that case to hold that in encouraging Mr Adams to invest in storepods, which was unregulated activity, CLP had encouraged him to transfer out of his existing personal pension, which was a regulated activity, and accordingly contravened articles 25(1) and 53: see [82], [98]-[100] and [134]-[135]. Similar reasoning applies to entry into the SIPPs at step 2 of the arrangements made by Avacade and AA.

Article 33

54. Ground 9, for which permission was given, raises a narrow point on the construction of article 33(c) of the RAO, which provides that the introduction exception only applies where "the introduction is made with a view to the provision of independent advice or

the independent exercise of discretion in relation to investments generally or in relation to any class of investments to which the arrangements relate …". Mr Berkley submits that the words "in relation to investments generally or in relation to any class of investments to which the arrangements relate govern only the immediately preceding words "the independent exercise of discretion" and not the preceding alternative of "provision of independent advice". Mr Vineall QC contends, as the Trial Judge accepted, that the words govern each of the two alternatives of advice or exercise of discretion identified in the first part of the provision.

55. I do not see how Mr Berkley's construction would make any difference to the outcome on the facts of this case, but would unhesitatingly prefer the construction adopted by the Trial Judge. The provision removes regulation where, although the arrangements are with a view to a relevant transaction, the consumer is nevertheless to have the filter of protection afforded by the fact that the transaction is to take place on the advice of a regulated person, or by the regulated person exercising a discretion. The introducer escapes contravention of articles 25(2) and other provisions where he is an introducer if a regulated person is going to bring to bear its independent judgment. If one asks, "its judgment on what?" the answer is given in the final part of the provision: its independent judgment in relation to investments generally or in relation to any class of investments to which the arrangements relate. It is obviously intended to apply as much to advice as to the exercise of discretion. Mr Berkley's construction would leave the nature of the qualifying advice (but not the discretion) undefined and unqualified, which would lead to absurd results; the obvious intention was to require that the advice relate to investments if the exception is to be engaged.

56. The proposed new grounds (6) and (7) are:

> "(6) that the learned Judge was wrong to conclude at 280 that the SIPP administrators and trustees did not owe broader regulatory duties under PRIN and COBS 2.1.1R to undertake an independent exercise of discretion within the meaning of Art 33;
>
> (7) since the SIPP administrators and trustees did owe such duties as aforesaid, the learned Judge was wrong to conclude that relevant introductions were not effected with a view to the exercise of independent discretion within the meaning of Art 33."

57. What is now section 137A of FSMA empowers the FCA to make rules applying to authorised persons. One such set of rules is contained in the Principles set out in the FCA Handbook and referred to as PRIN duties. PRIN 2.1.1 provides that Principle 6 is that a firm must pay due regard to the interests of its customers and treat them fairly. Another such set of rules is the conduct of business obligations set out in the Conduct of Business Sourcebook ("COBS"). COBS 2.1.1R, termed "The client's best interests rule", provides: "A firm must act honestly, fairly and professionally in accordance with the best interests of its client." Client is defined as including a potential client or customer.

58. The new grounds as drafted comprise a single point addressed to the exercise of a discretion by the SIPP providers in relation to the decision to invest in the investment products at steps 3 and 4. That was the discretion upon which the appellants relied below and which was addressed and rejected by the Trial Judge at [280], although he

did not there refer to PRIN duties or COBS 2.1.1R for the simple reason that such provisions had not been relied on by the appellants. The appellants sought to challenge this conclusion in relation to the SIPP providers' role in their original grounds 10, 14 and 15, for which Asplin LJ refused permission. There is no basis for suggesting that the CPR 52.30 criteria are fulfilled in relation to these grounds, and accordingly I would refuse permission to advance them.

59. In oral argument, trailed in a written skeleton, Mr Berkley sought to rely on the PRIN duties and COBS 2.1.1R to support a different and entirely new argument, which was not pleaded and not advanced before the Trial Judge, and indeed not within the wording of the new grounds as drafted. This was that the relevant discretion was to be exercised by the SIPP provider at step 2, in deciding whether or not to admit the consumer to its SIPP scheme in the first place. It is at first sight difficult to see how the mere decision of a counterparty to enter into a transaction involves a relevant "discretion" for the purposes of art 33. But however that may be, the short answer is that if there were anything in the point it could and should have been raised at the trial when the factual basis could have been explored, with the benefit of expert evidence if appropriate. It would be relevant to know, for example, whether any of the SIPP providers in practice rejected any applicant referred by Avacade or AA, which would cast light on whether it was ever contemplated that they might. Such matters were not explored at the trial because the point was not pleaded or advanced. Nor, in the absence of evidence or argument on the point, did the Trial Judge make the findings of fact which Mr Berkley would need to support a submission that the arrangements were "with a view to" the exercise of a discretion by the SIPP providers in this respect.

60. Moreover the new point does not arise out of the assumed effect of *Adams*: it was common ground before the Trial Judge that step 2 involved the purchase of a security, and that remains common ground following *Adams*. Mr Berkley did not identify any reason for exercising a discretion under CPR 52.17 to allow this new ground to be advanced on appeal, other than his general submission that all the new grounds arose from the decision in *Adams*, which this does not.

61. I would therefore refuse permission to advance this new undrafted ground of appeal.

Article 29

62. The proposed new ground (2) is that: "the learned Judge was wrong to hold that article 29 had no application [248] given that no pecuniary reward or other advantage was obtained at "step 2" from the arrangements associated with the SIPP transfer save as identified at [250] [the Berkeley Burke £750 per customer for whom it was the SIPP provider]."

63. This is in substance the same point as advanced in grounds 6, 7 and 8 of the original grounds, for which Asplin LJ refused permission. The fact that *Adams* was decided after Asplin LJ's decision does not permit that decision to be reopened, and there is no other basis for suggesting that the CPR 52.30 criteria are fulfilled. Accordingly I would refuse permission to advance new ground (2).

64. I would in any event have refused permission on the ground that the point lacks merit, even on the basis of the assumed effect of *Adams*. The Trial Judge held that the exclusion in article 29(1) did not apply because article 29(2)(b) was engaged by reason

of Avacade/AA receiving a pecuniary reward for which they did not account to the consumer arising out of the making of the arrangements. The pecuniary reward was the commission earned from investment in the various products; and additionally in the case of Avacade, the £750 per client received from Berkeley Burke in the instances in which it was the SIPP provider; and additionally in the case of AA, the £95 per customer received from BlackStar.

65. The assumed effect of *Adams* is that only entry into the SIPP at step 2 involved the buying or selling a security, but that does not, in my view, render irrelevant to article 29(2) the commissions received from investment in the products from within the SIPPs (over and above the accepted relevant pecuniary rewards in the Berkeley Burke and BlackStar fees, and the commissions from Beaufort). Sub-paragraph (2)(b) of article 29 looks to pecuniary reward "arising out of his making the arrangements". The arrangements of Avacade and AA in this case must be looked at as an indivisible and seamless whole, being with a view to both entry into the SIPP and the product investments. On the Trial Judge's findings, and as is inherent in the whole business model, entering into the SIPP was not an end in itself but a stage in the process of earning the commission as a result of the subsequent and consequent investment in the products. The commission arose out of making the arrangements, as a whole, and the arrangements as a whole were with a view to the purchase of securities because they involved entry into the SIPPs.

Conclusion on the first appeal

66. Accordingly I would dismiss the first appeal.

The Second Appeal

67. Section 382 FSMA provides:

> "382 **Restitution orders.**
>
> (1) The court may, on the application of the appropriate regulator or the Secretary of State, make an order under subsection (2) if it is satisfied that a person has contravened a relevant requirement, or been knowingly concerned in the contravention of such a requirement, and—
>
> (a) that profits have accrued to him as a result of the contravention; or
>
> (b) that one or more persons have suffered loss or been otherwise adversely affected as a result of the contravention.
>
> (2) The court may order the person concerned to pay to the regulator concerned such sum as appears to the court to be just having regard—
>
> (a) in a case within paragraph (a) of subsection (1), to the profits appearing to the court to have accrued;
>
> (b) in a case within paragraph (b) of that subsection, to the extent of the loss or other adverse effect;

(c) in a case within both of those paragraphs, to the profits appearing to the court to have accrued and to the extent of the loss or other adverse effect."

68. The existing ground of appeal, for which Asplin LJ gave permission, is dependent upon success in the first appeal. It must therefore fail if I am right in my conclusions on the first appeal.

69. The new ground proposed in the light of the assumed effect of *Adams* is that the Remedies Judge was wrong to determine that profits had accrued to AA, CL or LL as a result of the relevant contravention; or that the consumers suffered loss or had been adversely affected as a result of relevant contravention.

70. The Remedies Judge recorded that the FCA advanced its case on the amount of appropriate interim restitution orders on a number of alternative bases. The primary case was on the basis of an assumed loss by consumers of a minimum of 50% of the investments in the Mosaic Caribe, AgroEnergy and Ethical Forestry investments. The Remedies Judge rejected this basis.

71. The first alternative basis, which the Judge accepted, was termed "Gain-Loss Proxy". It was based on the sums received by each of the defendants as a proxy for losses suffered by the consumers from the product investments on the twin assumptions (a) that any commissions/fees paid to Avacade or AA, from which CL or LL or Mr Fox derived their own personal economic benefit, must ultimately have come from the investors' money; and (b) that but for the proven contraventions no such money would have been transferred (i.e. lost) by those investors.

72. The second alternative basis, which the Judge said he would also have accepted if he had not adopted the Gain-Loss Proxy argument, was that the same sums represented the "profits appearing to have accrued" to the defendants.

73. The argument of Mr Berkley is simply that these figures are based on the total commissions received, as found by the Trial Judge, and that with the exception of the Berkeley Burke fees, none were "as a result of" the contravention which was confined to making arrangements for entering into the SIPP. To my mind if the argument were sound, the exception would also extend to the fees from BlackStar and Beaufort so far as AA is concerned, but there are no findings by the Trial Judge (or the Remedies Judge) as to what part, if any, of these particular fees reached the individuals. The real issue is whether Mr Berkley's argument is sound.

74. Section 382 is structured so that sub section (1) provides a gateway which has to be passed in order for the jurisdiction to make a restitution order to arise. Sub-section (2) provides for the amount of the order if the gateway is passed. It is in subsection (1), the gateway, that the requirement is to be found that the profit or loss must have been "as a result of the contravention". Subsection (2) refers merely to profit accrued or loss, and does not define the amount to be awarded, but rather provides that regard must be had to it in ordering payment of such sum as appears to the court to be just. Nevertheless it would require unusual circumstances, in my view, for a court to hold that there was some profit or loss as a result of the contravention, but it was just to order payment of a greater amount, not all of which was "as a result of" the contravention. That was not the approach adopted by the Remedies Judge or urged upon us by the FCA. The question is therefore whether the commissions earned on the purchase of the

product investments were "as a result of" the contraventions found by the Trial Judge, as now modified by the assumed effect of the decision in *Adams*.

75. I have concluded that they were, for each of two reasons. The first is the seamless and indivisible nature of the arrangements made. It is only if step 2 can be treated as separate and distinct from steps 3 and 4 that it can be argued that the profit/loss arose as a result of a distinct part of the scheme which involved no contravention. But on the Trial Judge's findings, and as is inherent in the very nature of the business models, the product investment was a part of a single set of arrangements which formed an indivisible whole. That single set of arrangements involved contravention by advising and arranging for the consumers to enter into the SIPPs for the purposes of securing the product investments, and profit/loss from the investments which such entry was intended to achieve. The contravention was a single indivisible set of arrangements; the profit/loss arose as a result of those arrangements.

76. The second reason is that I would equate the test of causation in the words found in s. 382, "as a result of", with the common law test in negligence, namely that the contravention must be an efficient cause, but it need not be the sole or dominant cause: see generally Clerk & Lindsell on Torts, 23rd edn at 2-09ff. This test applies to breaches of statutory duty requiring proof of damage and was the test applied by Henderson J, as he then was, in *Walker v Inter-Alliance Group plc* [2007] EWHC 1858 (Ch) at [98] in relation to the same language in s. 61(2) FSA 1986, which conferred a cause of action on a person suffering loss "as a result of" a contravention of that Act. Applying that test I would conclude that the consumer's entry into the SIPP was an efficient cause of the investment in the products and the consequent earning of commission. It was not the sole cause, or even the dominant cause, but the use of the SIPP was a necessary precursor to the investment being made and did more than merely provide the opportunity for the investment. The product investments could only be achieved by calling on the savings of consumers from their pensions, and that required the use of a pension mechanism, the SIPP, in order to make the investment. The transfer into the SIPP had an effective and efficient causative potency in bringing about the product investments and their consequent commission, even if analysed as a separate step in the arrangements.

77. An analogy may be drawn with *Emptage v Financial Services Compensation Scheme* [2013] EWCA Civ 729. In that case the claimant had been advised by an authorised insurance and mortgage broker to re-mortgage her house and invest the proceeds in a property in Spain, which became virtually worthless following the collapse of the Spanish property market in the financial crisis of 2007/8. Advice on the re-mortgage was a regulated activity; advice on the purchase of the Spanish property was not. The claimant made a claim against the Financial Services Compensation Scheme ("FSCS") which was liable to pay "fair compensation" for any breach of the conduct of business rules by a financial adviser which was unable to satisfy claims against it in respect of regulated activities. FSCS argued that the loss was suffered as a result of the unregulated activity of advising the claimant to invest in the Spanish property and declined to pay. Haddon-Cave J, as he then was, held FSCS was liable to pay the loss and his decision was upheld by the Court of Appeal. At [19]-[20] Moore-Bick LJ, with whom Sullivan and Underhill LJJ agreed, noted that the breach of the conduct of business rules which FSCS accepted the mortgage broker had contravened comprised advising the claimant to enter into a mortgage which was unsuitable because she would

not be able to service it if her investment of the proceeds failed to live up to expectations. He held that this was causative of the loss because it exposed her to a risk which later came about, causing her to lose her capital and with it her home. The loss suffered therefore flowed from the bad advice in relation to mortgaging her home, which was a regulated activity. Similarly in the current case, Avacade/AA were in contravention of FSMA in making arrangements for the consumers to enter into SIPPs, whose purpose was to enable them to direct the investment of their money into risky products. It was that regulated activity which exposed the consumers to the risk of losses from the product investments they were then intended and enabled to direct, and that risk came about, causing the losses represented by the commissions.

78. By way of postscript, I would also observe that even if Mr Berkley's argument were sound, it would not exclude commissions paid in respect of the bonds as regulated investments, even on the assumed effect of *Adams*. This is because the contraventions were not confined to the making of arrangements contrary to article 25(2) which has formed the subject matter of the first appeal. The Trial Judge also made findings that Avacade and AA made misleading statements in relation to investment in the products contrary to s. 397 FSMA and s. 89 FSA, including that they were less volatile and risky than equities: see [435] and declarations 1(2) and 2.3. S. 397(2), and its successor s. 89(2), make clear that it is sufficient if the statements are made for the purpose of someone other than the representee entering into a regulated investment. The fact that Avacade and AA were guilty of promoting the regulated investments with a view to their being purchased by the trustees of the SIPP schemes on the consumer's instructions, rather than by the customers themselves, as is being assumed, does not affect the finding that the purchases, and therefore the commissions, were as a result of the false and misleading statements in promoting them.

79. Accordingly I would refuse permission to raise the new ground in respect of the appeal from the Remedies Judge because it lacks merit.

80. I would therefore also dismiss the second appeal.

Lord Justice Peter Jackson :

81. I agree.

Sir Geoffrey Vos, MR :

82. I also agree.